



9. Massachusetts Bay Transportation Authority Standard Contract

CONTRACTOR LEGAL NAME: (and d/b/a):		Massachusetts Bay Transportation Authority (MBTA)	
Legal Address: (W-9, W-4,T&C):		10 Park Plaza Boston, MA 02116	
Contract Administrator/Manager:		Billing Address : invoices@mbta.com	
E-Mail:		Contract Administrator/Manager:	
Phone:	Fax:	Email:	
		Phone:	
		RFQ/RFP/IFB/Procurement or Other ID Number: 139B-23 COMMBUYS # BD- 23-1206-40000-40000-	

<p style="text-align: center;"><u>NEW CONTRACT</u></p> <p>PROCUREMENT OR EXCEPTION TYPE: (Check one option only)</p> <p><input type="checkbox"/> Statewide Contract (OSD or an OSD-designated Department)</p> <p><input type="checkbox"/> Collective Purchase (Attach OSD approval, scope, budget)</p> <p><input checked="" type="checkbox"/> MBTA Procurement Attach RFQ/RFP/IFB and Response or other procurement supporting documentation)</p> <p><input type="checkbox"/> Emergency Contract (Attach justification for emergency, scope, budget)</p> <p><input type="checkbox"/> Contract Employee (Attach <u>Employment Status Form</u>, scope, budget)</p> <p><input type="checkbox"/> Legislative/Legal or Other: (Attach authorizing language/justification, scope and budget)</p>	<p style="text-align: center;"><u>CONTRACT AMENDMENT</u></p> <p>Enter Current Contract End Date <u>Prior</u> to Amendment: _____, 20__.</p> <p>Enter Amendment Amount: \$____. (or "no change")</p> <p>AMENDMENT TYPE: (Check one option only. Attach details of Amendment changes.)</p> <p><input type="checkbox"/> Amendment to Scope or Budget (Attach updated scope and budget)</p> <p><input type="checkbox"/> Interim Contract (Attach justification for Interim Contract and updated scope/budget)</p> <p><input type="checkbox"/> Contract Employee (Attach any updates to scope or budget)</p> <p><input type="checkbox"/> Legislative/Legal or Other: (Attach authorizing language/justification and updated scope and budget)</p>
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The MBTA Terms and Conditions (T&C) have been executed, and is incorporated by reference into this Contract.

COMPENSATION: (Check ONE option): The MBTA certifies that payments for authorized performance accepted in accordance with the terms of this Contract

☐ **Rate Contract** (No Maximum Obligation. Attach details of all rates, units, calculations, conditions or terms and any changes if rates or terms are being amended.)

☐ **Maximum Obligation Contract** Enter Total Maximum Obligation for total duration of this Contract (or **new** Total if Contract is being amended). \$_____.

PROMPT PAYMENT DISCOUNTS (PPD): MBTA payments are issued through EFT 45 days from invoice receipt. Contractors requesting **accelerated** payments must identify a PPD as follows: Payment issued within 10 days ___% PPD; Payment issued within 15 days ___% PPD; Payment issued within 20 days ___% PPD; Payment issued within 30 days ___% PPD. If PPD percentages are left blank, identify reason: agree to standard 45 day cycle only initial payment (subsequent payments scheduled to support standard EFT 45 day payment cycle. See Prompt Pay Discounts Policy.)

BRIEF DESCRIPTION OF CONTRACT PERFORMANCE or REASON FOR AMENDMENT: (Enter the Contract title, purpose, fiscal year(s) and a description of the scope of performance or what is being amended for a Contract Amendment. Attach all supporting documentation and justifications.)

ANTICIPATED START DATE: (Complete ONE option only) MBTA and Contractor certify for this Contract, or Contract Amendment, that Contract obligations:

☒ 1. May be incurred as of the Effective Date (latest signature date below) and **no** obligations have been incurred **prior** to the Effective Date.

☐ 2. May be incurred as of __, 20__, a date **LATER** than the Effective Date below and **no** obligations have been incurred **prior** to the Effective Date.

☐ 3. were incurred as of __, 20__, a date **PRIOR** to the Effective Date below, and the parties agree that payments for any obligations incurred prior to the Effective Date are authorized to be made either as settlement payments or as authorized reimbursement payments, and that the details and circumstances of all obligations under this Contract are attached and incorporated into this Contract. Acceptance of payments forever releases the MBTA from further claims related to these obligations

CONTRACT END DATE: Contract performance shall terminate as of __, 20__, with no new obligations being incurred after this date unless the Contract is properly amended, provided that the terms of this Contract and performance expectations and obligations shall survive its termination for the purpose of resolving any claim or dispute, for completing any negotiated terms and warranties, to allow any close out or transition performance, reporting, invoicing or final payments, or during any lapse between amendments.

CERTIFICATIONS: Notwithstanding verbal or other representations by the parties, the "**Effective Date**" of this Contract or Amendment shall be the latest date that this Contract or Amendment has been executed by an authorized signatory of the Contractor, the MBTA, or a later Contract or Amendment Start Date specified above, subject to any required approvals. The Contractor makes all certifications required under the attached Contractor Certifications (incorporated by reference if not attached hereto) under the pains and penalties of perjury, agrees to provide any required documentation upon request to support compliance, and agrees that all terms governing performance of this Contract and doing business in Massachusetts are attached or incorporated by reference herein according to the following hierarchy of document precedence, the applicable MBTA Terms and Conditions, this Standard Contract Form including the Instructions and Contractor Certifications, the Request for Qualifications (RFQ), Request for Proposal (RFP), Invitation for Bid (IFB) or other solicitation, the Contractor's Response, and additional negotiated terms, provided that additional negotiated terms will take precedence over the relevant terms in the RFQ/RFP/IFB and the Contractor's Response only if made using the process outlined in 801 CMR 21.07, incorporated herein, provided that any amended RFQ/RFP/IFB or Response terms result in best value, lower costs, or a more cost effective Contract.

<p><u>AUTHORIZING SIGNATURE FOR THE CONTRACTOR:</u></p> <p>X: _____ Date: _____</p> <p>(Signature and Date Must Be Handwritten At Time of Signature or utilize an MBTA approved electronic signature)</p> <p>Print Name: _____</p> <p>Print Title: _____</p>	<p><u>AUTHORIZING SIGNATURE FOR THE MBTA:</u></p> <p>X: _____ Date: _____</p> <p>(Signature and Date Must Be Handwritten At Time of Signature or utilize an MBTA approved electronic signature)</p> <p>Print Name: _____</p> <p>Print Title: _____</p>
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9.1 Standard Terms and Conditions

Upon execution by the Contractor, these Terms and Conditions will be incorporated by reference into any Contract executed by the Contractor and the Massachusetts Bay Transportation Authority (MBTA), in the absence of a superseding law or regulation requiring a different Contract form. Performance shall include services rendered, obligations due, costs incurred, commodities and deliverables provided and accepted by the MBTA, programs provided, or other commitments authorized under a Contract. A deliverable shall include any tangible product to be delivered as an element of performance under a Contract. The MBTA is entitled to ownership and possession of all deliverables purchased or developed with MBTA funds.

9.1.1 Contract Effective Start Date

Notwithstanding verbal or other representations by the parties, or an earlier start date indicated in a Contract, the effective start date of performance under a Contract shall be the date a Contract has been executed by an authorized signatory of the Contractor, the MBTA, a later date specified in the Contract, or the date of any approvals required by law or regulation, whichever is later.

9.1.2 Payments and Compensation

The Contractor shall only be compensated for performance delivered and accepted by the MBTA in accordance with the specific Terms and Conditions of a Contract. Overpayments shall be reimbursed by the Contractor or may be offset by the MBTA from future payments in accordance with state finance law. Acceptance by the Contractor of any payment or partial payment, without any written objection by the Contractor, shall in each instance operate as a release and discharge of the MBTA from all claims, liabilities or other obligations relating to the performance of a Contract.

9.1.3 Contractor Payment Mechanism

All Contractors will be paid using the MBTA invoicing system and Contractor will submit its invoice with all supporting documentation as prescribed in a Contract. The MBTA shall review and return rejected invoices within fifteen (15) days of receipt with a written explanation for rejection, provided that payment periods listed in a Contract of less than forty-five (45) days from the date of receipt of an invoice shall be effective only to enable the MBTA to take advantage of early payment incentives and shall not subject any payment made within the forty-five (45) day period to a penalty.

9.1.4 Contract Termination or Suspension

A Contract shall terminate on the date specified in a Contract, unless this date is properly amended in accordance with all applicable laws and regulations prior to this date, or unless terminated or suspended under this Section upon prior written notice to the Contractor. The MBTA may terminate a Contract without cause and without penalty, or may terminate or suspend a Contract if the Contractor breaches any material term or condition or fails to perform or fulfill any material obligation required by a Contract, or in the event of an elimination of an appropriation or availability of sufficient funds for the purposes of a Contract, or in the event of an unforeseen public emergency mandating immediate MBTA action. Upon immediate notification to the other party, neither the MBTA nor the Contractor shall be deemed to be in breach for failure or delay in performance due to Acts of God or other causes factually beyond their control and without their fault or negligence. Subcontractor failure to perform or price increases due to market fluctuations or product availability will not be deemed factually beyond the Contractor's control.

9.1.5 Written Notice

Any notice shall be deemed delivered and received when submitted in writing in person or when delivered by any other appropriate method evidencing actual receipt by the MBTA or the Contractor. Any written notice of termination or suspension delivered to the Contractor shall state the effective date and period of the notice, the reasons for the termination or suspension, if applicable, any alleged breach or failure to perform, a reasonable period to cure any alleged breach or failure to perform, if applicable, and any



instructions or restrictions concerning allowable activities, costs or expenditures by the Contractor during the notice period.

9.1.6 Record-keeping and Retention, Inspection of Records

The Contractor shall maintain records, books, files and other data as specified in a Contract and in such detail as shall properly substantiate claims for payment under a Contract, for a minimum retention period of seven (7) years beginning on the first day after the final payment under a Contract, or such longer period as is necessary for the resolution of any litigation, claim, negotiation, audit or other inquiry involving a Contract. The MBTA shall have access, as well as any parties identified under Executive Order 195, during the Contractor's regular business hours and upon reasonable prior notice, to such records, including on-site reviews and reproduction of such records at a reasonable expense.

9.1.7 Assignment

The Contractor may not assign or delegate, in whole or in part, or otherwise transfer any liability, responsibility, obligation, duty or interest under a Contract without the written approval of the MBTA, with the exception that the Contractor shall be authorized to assign present and prospective claims for money due to the Contractor pursuant to a Contract in accordance with M.G.L. C. 106, §9-318. The Contractor must provide sufficient notice of assignment and supporting documentation to enable the MBTA to verify and implement the assignment. Payments to third party assignees will be processed as if such payments were being made directly to the Contractor and these payments will be subject to intercept, offset, counter-claims or any other MBTA rights which are available to the MBTA against the Contractor. The sale of fifty percent (50%) or more of the equity ownership of a Contractor shall be considered an assignment requiring the prior written approval of the MBTA. Impermissible assignments shall be null and void.

9.1.8 Subcontracting By Contractor

Any subcontract entered into by the Contractor for the purposes of fulfilling the obligations under a Contract must be in writing, authorized in advance by the MBTA and shall be consistent with and subject to the provisions of these MBTA Terms and Conditions and a Contract. Subcontracts will not relieve or discharge the Contractor from any duty, obligation, responsibility or liability arising under a Contract. The MBTA is entitled to copies of all subcontracts and shall not be bound by any provisions contained in a subcontract to which it is not a party. Subcontracts shall note that the MBTA is not a party to the subcontract. Failure to promptly pay a Sub-Contractor for work performed where the Contractor has been paid by the MBTA shall constitute a material breach of the Contract between MBTA and Contractor.

9.1.9 Affirmative Action, Non-Discrimination in Hiring and Employment

The Contractor shall comply with all federal and state laws, rules and regulations promoting fair employment practices or prohibiting employment discrimination and unfair labor practices and shall not discriminate in the hiring of any applicant for employment nor shall any qualified employee be demoted, discharged or otherwise subject to discrimination in the tenure, position, promotional opportunities, wages, benefits or terms and conditions of their employment because of race, color, national origin, ancestry, age, sex, religion, disability, handicap, sexual orientation or for exercising any rights afforded by law. The Contractor commits to purchasing supplies and services from certified minority or women-owned businesses, small businesses or businesses owned by socially or economically disadvantaged persons or persons with disabilities.

9.1.10 Indemnification

The Contractor shall release, defend (at the MBA's option), indemnify and hold harmless the MBTA, its agents, officers and employees (collectively the "indemnified parties") against any and all claims, demands, liabilities, judgments, penalties, costs, expenses (including attorneys' fees and experts' fees), and damages ("Claims") based on or arising out of any actual or alleged loss or injury (including death) to persons or damage to real or tangible property, or patent or copyright infringement, that are caused or alleged to be



caused, in whole or in part, by, or arising out of the acts or omissions of the Contractor, its agents, servants, employees or subcontractors. The MBTA agrees to notify the Contractor in writing within a reasonable period of time of the assertion of any Claim for which the Contractor has agreed to indemnify the MBTA pursuant to this section. The MBTA shall not be liable for any costs incurred by the Contractor arising under this section. If the MBTA incurs any cost or fees for attorneys or experts, or any other costs or expense, to enforce its right to indemnification or defense under this section, the Contractor shall fully reimburse the MBTA for such costs, fees and expense.

9.1.11 Waivers

Forbearance or indulgence in any form or manner by a party shall not be construed as a waiver, nor shall it in any way limit the legal or equitable remedies available to that party. No waiver by either party of any default or breach shall constitute a waiver of any subsequent default or breach.

9.1.12 Reserved [NTD: provisions added in supplemental section that specifically address energy]

9.1.13 Risk of Loss

The Contractor shall bear the risk of loss for any Contractor materials used for a Contract and for all deliverables, MBTA personal or other data which is in the possession of the Contractor or used by the Contractor in the performance of a Contract until possession, ownership and full legal title to the deliverables are transferred to and accepted by the MBTA.

9.1.14 Forum, Choice of Law and Mediation

Any actions arising out of a Contract shall be governed by the laws of Massachusetts, and shall be brought and maintained in a State or federal court in Massachusetts which shall have exclusive jurisdiction thereof. The MBTA and the Contractor may agree to voluntary mediation through the Massachusetts Office of Dispute Resolution (MODR) of any Contract dispute and will share the costs of such mediation. No legal or equitable rights of the parties shall be limited by this Section.

9.1.15 Interpretation, Severability, Conflicts with Law, Integration

Any amendment or attachment to any Contract which contains conflicting language or has the effect of a deleting, replacing or modifying any printed language of these MBTA Terms and Conditions, shall be interpreted as superseded by the official printed language. If any provision of a Contract is found to be superseded by state or federal law or regulation, in whole or in part, then both parties shall be relieved of all obligations under that provision only to the extent necessary to comply with the superseding law, provided however, that the remaining provisions of the Contract, or portions thereof, shall be enforced to the fullest extent permitted by law. All amendments must be executed by the parties in accordance with Section 8.1.1 of these MBTA Terms and Conditions (*Section 8.1*). The printed language of the Standard Contract Form (*Section 8.0*), which incorporates by reference these MBTA Terms and Conditions, shall supersede any conflicting verbal or written agreements relating to the performance of a Contract, or attached thereto, including contract forms, purchase orders or invoices of the Contractor. The order of priority of documents to interpret a Contract shall be as follows: any applicable federal provisions, any supplemental provisions, any negotiated terms and conditions allowable pursuant to law or regulation; the printed language of the MBTA Terms and Conditions; the Standard Contract; the MBTA's Request for Qualifications/Proposal/Bid (RFQ/RFP/IFB) solicitation document; and the Contractor's Response to the RFQ/RFP/IFB solicitation, excluding any language stricken by the MBTA as unacceptable.

9.1.16 Insurance to be Carried by the Contractor – Reserved

Not applicable for this procurement.



9.1.17 Contractor Certifications and Legal References

The Contractor makes all certifications required under this Contract under the pains and penalties of perjury, and agrees to provide any required documentation upon request to support compliance, and agrees that all terms governing performance of this Contract and doing business in Massachusetts are attached or incorporated by reference herein.

9.1.17.1 MBTA and Contractor Ownership Rights

The Contractor certifies and agrees that the MBTA is entitled to ownership and possession of all “deliverables” purchased or developed with Contract funds.

9.1.17.2 Qualifications

The Contractor certifies it is qualified and shall at all times remain qualified to perform this Contract; that performance shall be timely and meet or exceed industry standards for the performance required, including obtaining requisite licenses, registrations, permits, resources for performance, and sufficient professional, liability; and other appropriate insurance to cover the performance. If the Contractor is a business, the Contractor certifies that it is listed under the Secretary of State’s website as licensed to do business in Massachusetts, as required by law.

9.1.17.3 Business Ethics and Fraud, Waste and Abuse Prevention

The Contractor certifies that performance under this Contract, in addition to meeting the terms of the Contract, will be made using ethical business standards and good stewardship of taxpayer and other public funding and resources to prevent fraud, waste and abuse.

9.1.17.4 Collusion

The Contractor certifies that this Contract has been offered in good faith and without collusion, fraud or unfair trade practices with any other person, that any actions to avoid or frustrate fair and open competition are prohibited by law, and shall be grounds for rejection or disqualification of a Response or termination of this Contract.

9.1.17.5 Public Records and Access

The Contractor shall provide full access to records related to performance and compliance to the MBTA pursuant to G.L. c. 11, s.12 for seven (7) years beginning on the first day after the final payment under this Contract or such longer period necessary for the resolution of any litigation, claim, negotiation, audit or other inquiry involving this Contract. Access to view Contractor records related to any breach or allegation of fraud, waste and/or abuse may not be denied and Contractor cannot claim confidentiality or trade secret protections solely for viewing but not retaining documents. Routine Contract performance compliance reports or documents related to any alleged breach or allegation of non-compliance, fraud, waste, abuse or collusion may be provided electronically and shall be provided at Contractor’s own expense. Reasonable costs for copies of non-routine Contract related records shall not exceed the rates for public records under the Massachusetts Public Records Law.

9.1.17.6 Debarment

The Contractor certifies that neither it nor any of its subcontractors are currently debarred or suspended by the federal or state government under any law or regulation.

9.1.17.7 Applicable Laws

The Contractor shall comply with all applicable state laws and regulations including but not limited to the applicable Massachusetts General Laws; Code of Massachusetts Regulations 801 CMR 21.00 (Procurement of Commodity and Service Procurements); M G.L. c. 66A; and the Massachusetts Constitution Article



XVIII if applicable.

9.1.17.8 Tax Law Compliance

The Contractor certifies under the pains and penalties of perjury tax compliance with Federal tax laws; state tax laws including but not limited to G.L. c. 62C, G.L. c. 62C, s. 49A; compliance with all state tax laws, reporting of employees and contractors, withholding and remitting of tax withholdings and child support and is in good standing with respect to all state taxes and returns due; reporting of employees and contractors under G.L. c. 62E, withholding and remitting child support including G.L. c. 119A, s. 12; TIR 05-11; New Independent Contractor Provisions and applicable TIRs.

9.1.17.9 Bankruptcy, Judgments, Potential Structural Changes, Pending Legal Matters and Conflicts

The Contractor certifies it has not been in bankruptcy and/or receivership within the last three calendar years, and the Contractor certifies that it will immediately notify the Department in writing **at least 45 days prior** to filing for bankruptcy and/or receivership, any potential structural change in its organization, or if there is **any risk** to the solvency of the Contractor that may impact the Contractor's ability to timely fulfill the terms of this Contract or Amendment. The Contractor certifies that at any time during the period of the Contract the Contractor is required to affirmatively disclose in writing to the Department Contract Manager the details of any judgment, criminal conviction, investigation or litigation pending against the Contractor or any of its officers, directors, employees, agents, or subcontractors, including any potential conflicts of interest of which the Contractor has knowledge, or learns of during the Contract term. Law firms or Attorneys providing legal services are required to identify any potential conflict with representation of any Department client in accordance with Massachusetts Board of Bar Overseers (BBO) rules.

9.1.17.10 Federal Anti-Lobbying and Other Federal Requirements

If receiving federal funds, the Contractor certifies compliance with federal anti-lobbying requirements including 31 USC 1352; other federal requirements; Executive Order 11246; Air Pollution Act; Federal Water Pollution Control Act and Federal Employment Laws.

9.1.17.11 Protection of Commonwealth Data, Personal Data and Information

The Contractor certifies that all steps will be taken to ensure the security and confidentiality of all Commonwealth/MBTA data for which the Contractor becomes a holder, either as part of performance or inadvertently during performance, with special attention to restricting access, use and disbursement of personal data and information under M.G.L. c. 93H and c. 66A and other applicable state and federal privacy requirements. The Contractor shall comply with M.G.L. c. 93I for the proper disposal of all paper and electronic media, backups or systems containing personal data and information. The Contractor shall also ensure that any personal data or information transmitted electronically or through a portable device is properly encrypted using (at a minimum) the Commonwealth's "Cryptographic Management Standard" set forth in the Enterprise Information Security Policies and Standards published by the Executive Office for Technology, Services and Security (TSS), or a comparable Standard prescribed by the MBTA. Contractors with access to credit card or banking information of Commonwealth/MBTA customers certify that the Contractor is PCI compliant in accordance with the Payment Card Industry Council Standards, and shall provide confirmation compliance during the Contract. The Contractor shall immediately notify the MBTA in the event of any security breach including the unauthorized access, disbursement, use or disposal of personal data or information, and in the event of a security breach, the Contractor shall cooperate fully with the MBTA and provide access to any information necessary for the MBTA to respond to the security breach and shall be fully responsible for any damages associated with the Contractor's breach including but not limited to G.L. c. 214, s. 3B.

For all Contracts involving the Contractor's access to personal information, as defined in G.L. c. 93H, and personal data, as defined in G.L. c. 66A, or access to MBTA or Commonwealth systems containing such



information or data, Contractor certifies under the pains and penalties of perjury that the Contractor (1) has read M.G.L. c. 93H and c. 66A and agrees to protect any and all personal information and personal data; and (2) has reviewed all of the Enterprise Information Security Policies and Standards published by the Executive Office for Technology Services and Security (TSS), or stricter standards prescribed by the MBTA. Notwithstanding any contractual provision to the contrary, in connection with the Contractor's performance under this Contract, for all public authorities, executive offices, boards, commissions, agencies, departments, divisions, councils, bureaus, and offices, now existing and hereafter established, the Contractor shall: (1) obtain a copy, review, and comply with any pertinent security guidelines, standards, and policies; (2) comply with all Enterprise Information Security Policies and Standards published by the Executive Office for Security Services and Technology (TSS), or a comparable set of policies and standards ("Information Security Policy") as prescribed by the MBTA; (3) communicate and enforce such security guidelines, standards, policies and the applicable Information Security Policy among all employees (whether such employees are direct or contracted) and subcontractors; (4) implement and maintain any other reasonable appropriate security procedures and practices necessary to protect personal information and data to which the Contractor is given access by the MBTA from the unauthorized access, destruction, use, modification, disclosure or loss; (5) be responsible for the full or partial breach of any of these terms by its employees (whether such employees are direct or contracted) or subcontractors during or after the term of this Contract, and any breach of these terms may be regarded as a material breach of this Contract; (6) in the event of any unauthorized access, destruction, use, modification, disclosure or loss of the personal information or personal data (collectively referred to as the "unauthorized use"): (a) immediately notify the MBTA if the Contractor becomes aware of the unauthorized use; (b) provide full cooperation and access to information necessary for the MBTA to determine the scope of the unauthorized use; and (c) provide full cooperation and access to information necessary for the MBTA and the Contractor to fulfill any notification requirements. Breach of these terms may be regarded as a material breach of this Contract, such that the Commonwealth and MBTA may exercise any and all contractual rights and remedies, including without limitation indemnification under Section 8.1.10 of MBTA's [Terms and Conditions](#), withholding of payments, Contract suspension, or termination. In addition, the Contractor may be subject to applicable statutory or regulatory penalties, including and without limitation, those imposed pursuant to G.L. c. 93H and under [G.L. c. 214, § 3B](#) for violations under M.G.L. c. 66A.

9.1.17.12 Corporate and Business Filings and Reports

The Contractor certifies compliance with any certification, filing, reporting and service of process requirements of the Secretary of and other Departments as related to its conduct of business in the Commonwealth; and with its incorporating state (or foreign entity).

9.1.17.13 Employer Requirements

Contractors that are employers certify compliance with applicable state and federal employment laws or regulations, including but not limited to [G.L. c. 5, s. 1](#) (Prevailing Wages for Printing and Distribution of Public Documents); [G.L. c. 7, s. 22](#) (Prevailing Wages for Contracts for Meat Products and Clothing and Apparel); [minimum wages and prevailing wage programs and payments](#); [unemployment insurance and contributions](#); [workers' compensation and insurance](#), child labor laws, [AGO fair labor practices](#); [G.L. c. 149](#) (Labor and Industries); [G.L. c. 150A](#) (Labor Relations); [G.L. c. 151](#) and [455 CMR 2.00](#) (Minimum Fair Wages); [G.L. c. 151A](#) (Employment and Training); [G.L. c. 151B](#) (Unlawful Discrimination); [G.L. c. 151E](#) (Business Discrimination); [G.L. c. 152](#) (Workers' Compensation); [G.L. c. 153](#) (Liability for Injuries); [102 CMR 12.00](#) (Dependent Care Assistance Program); [29 USC c. 8](#) (Federal Fair Labor Standards); [29 USC c. 28](#) and the [Federal Family and Medical Leave Act](#) and [M.G.L. c. 175M](#) (Family and Medical Leave).

9.1.17.14 Federal And State Laws And Regulations Prohibiting Discrimination

Contractors certify compliance with applicable state and federal anti-discrimination laws including but not limited to the [Federal Equal Employment Opportunity \(EEO\) Laws](#) the [Americans with Disabilities Act](#); [42 U.S.C Sec. 12,101, et seq.](#), the [Rehabilitation Act](#), [29 USC c. 16 s. 794](#); [29 USC c. 16. s. 701](#); [29 USC](#)



c. 14, 623; the 42 USC c. 45; (Federal Fair Housing Act); G. L. c. 151B (Unlawful Discrimination); G.L. c. 151E (Business Discrimination); the Public Accommodations Law G.L. c. 272, s. 92A; G.L. c. 272, s. 98 and 98A, Massachusetts Constitution Article CXIV and G.L. c. 93, s. 103; 47 USC c. 5, sc. II, Part II, s. 255 (Telecommunication Act; Chapter 149, Section 105D, G.L. c. 151C, G.L. c. 272, Section 92A, Section 98 and Section 98A, and G.L. c. 111, Section 199A, and Massachusetts Disability-Based Non-Discrimination Standards For Executive Branch Entities, and related Standards and Guidance, authorized under Massachusetts Executive Order or any disability-based protection arising from state or federal law or precedent. See also MCAD and MCAD links and Resources.

9.1.17.15 Right-to-Know Law

The Contractor shall certify that it will comply with the Massachusetts Right-To-Know Law, Chapter 470 of the Acts of 1983. Additionally, the Contractor agrees to submit a Material Safety Data Sheet (MSDS) for each toxic or hazardous substance, or mixture containing such substance, pursuant to M.G.L. c. 111F §§ 8, 9, and 10, and the regulations contained in 441 CMR § 21.06 when deliveries are made.

9.1.17.16 Small Business Purchasing Program (SBPP)

A Contractor may be eligible to participate in the SBPP, created pursuant to Executive Order 523, if qualified through the SBPP COMMBUYS subscription process at: www.commbuys.com and with acceptance of the terms of the SBPP participation agreement.

9.1.17.17 Other Damages

The term “other damages” shall include, but shall not be limited to, the reasonable costs the MBTA incurs to repair, return, replace or seek cover (purchase of comparable substitute commodities and services) under a Contract. “Other damages” shall not include damages to the MBTA as a result of third party claims, provided, however, that the foregoing in no way limits the MBTA’s right of recovery for personal injury or property damages or patent and copyright infringement under *Section 8.1.10* nor the MBTA’s ability to join the contractor as a third party defendant. Further, the term “other damages” shall not include, and in no event shall the contractor be liable for, damages for the MBTA’s use of contractor provided products or services, loss of MBTA records, or data (or other intangible property), loss of use of equipment, lost revenue, lost savings or lost profits of the MBTA. In no event shall “other damages” exceed the greater of \$100,000, or two times the value of the product or service (as defined in the Contract scope of work) that is the subject of the claim. *Section 8.1.10* sets forth the contractor’s entire liability under a Contract. Nothing in this section shall limit the MBTA’s ability to negotiate higher limitations of liability in a particular Contract, provided that any such limitation must specifically reference *Section 8.1.10* of the MBTA Terms and Conditions. In the event the limitation of liability conflicts with accounting standards which mandate that there can be no cap of damages, the limitation shall be considered waived for that audit engagement.

9.1.17.18 Northern Ireland Certification

Pursuant to G.L. c. 7 s. 22C for state agencies, state authorities, the House of Representatives or the state Senate, by signing this Contract the Contractor certifies that it does not employ ten or more employees in an office or other facility in Northern Ireland and if the Contractor employs ten or more employees in an office or other facility located in Northern Ireland the Contractor certifies that it does not discriminate in employment, compensation, or the terms, conditions and privileges of employment on account of religious or political belief; and it promotes religious tolerance within the work place, and the eradication of any manifestations of religious and other illegal discrimination; and the Contractor is not engaged in the manufacture, distribution or sale of firearms, munitions, including rubber or plastic bullets, tear gas, armored vehicles or military aircraft for use or deployment in any activity in Northern Ireland.

9.1.17.19 Pandemic, Disaster or Emergency Performance

In the event of a serious emergency, pandemic or disaster outside the control of the MBTA, the MBTA may negotiate emergency performance from the Contractor to address the immediate needs of the MBTA even



if not contemplated under the original Contract or procurement. Payments are subject to appropriation and other payment terms.

9.1.17.20 Subcontractor Performance

The Contractor certifies full responsibility for Contract performance, including subcontractors, and that comparable Contract terms will be included in subcontracts, and that the Department will not be required to directly or indirectly manage subcontractors or have any payment obligations to subcontractors.

9.1.18 Executive Orders

For covered Executive state Departments, the Contractor certifies compliance with applicable Executive Orders (see also Massachusetts Executive Orders), including but not limited to the specific orders listed below. A breach during period of a Contract may be considered a material breach and subject Contractor to appropriate monetary or Contract sanctions.

9.1.18.1 Executive Order 481. Prohibiting the Use of Undocumented Workers on State Contracts

For all state agencies in the Executive Branch, including all executive offices, boards, commissions, agencies, Departments, divisions, councils, bureaus, and offices, now existing and hereafter established, by signing this Contract the Contractor certifies under the pains and penalties of perjury that they shall not knowingly use undocumented workers in connection with the performance of this Contract; that, pursuant to federal requirements, shall verify the immigration status of workers assigned to a Contract without engaging in unlawful discrimination; and shall not knowingly or recklessly alter, falsify, or accept altered or falsified documents from any such worker

9.1.18.2 Executive Order 130. Anti-Boycott

The Contractor warrants, represents and agrees that during the time this Contract is in effect, neither it nor any affiliated company, as hereafter defined, participates in or cooperates with an international boycott (See IRC § 999(b)(3)- (4), and IRS Audit Guidelines Boycotts) or engages in conduct declared to be unlawful by G.L. c. 151E, s. 2. A breach in the warranty, representation, and agreement contained in this paragraph, without limiting such other rights as it may have, the MBTA shall be entitled to rescind this Contract. As used herein, an affiliated company shall be any business entity of which at least 51% of the ownership interests are directly or indirectly owned by the Contractor or by a person or persons or business entity or entities directly or indirectly owning at least 51% of the ownership interests of the Contractor, or which directly or indirectly owns at least 51% of the ownership interests of the Contractor.

9.1.18.3 Executive Order 346. Hiring of State Employees By State Contractors

Contractor certifies compliance with both the conflict of interest law G.L. c. 268A specifically s. 5 (f) and this order; and includes limitations regarding the hiring of state employees by private companies contracting with the MBTA. A privatization contract shall be deemed to include a specific prohibition against the hiring at any time during the term of Contract, and for any position in the Contractor's company, any state management employee who is, was, or will be involved in the preparation of the RFQ, the negotiations leading to the awarding of the Contract, the decision to award the Contract, and/or the supervision or oversight of performance under the Contract.

9.1.18.4 Executive Order 444. Disclosure of Family Relationships with Other State Employees

Each person applying for employment (including Contract work) within the Executive Branch under the Governor must disclose in writing the names of all immediate family related to immediate family by marriage who serve as employees or elected officials of the Commonwealth. All disclosures made by applicants hired by the Executive Branch under the Governor shall be made available for public inspection



to the extent permissible by law by the official with whom such disclosure has been filed.

9.1.18.5 Executive Orders 523, 526, and 565

Executive Order 523 (Establishing the Massachusetts Small Business Purchasing Program). Executive Order 526 (Order Regarding Non-Discrimination, Diversity, Equal Opportunity and Affirmative Action which supersedes Executive Order 478). Executive Order 565 (Reaffirming and Expanding the Massachusetts Supplier Diversity Program). All programs, activities, and services provided, performed, licensed, chartered, funded, regulated, or contracted for by the state shall be conducted without unlawful discrimination based on race, color, age, gender, ethnicity, sexual orientation, gender identity or expression, religion, creed, ancestry, national origin, disability, veteran's status (including Vietnam-era veterans), or background. The Contractor and any subcontractors may not engage in discriminatory employment practices. The Contractor certifies compliance with applicable federal and state laws, rules, and regulations governing fair labor and employment practices. The Contractor also commits to purchase supplies and services from certified minority, women, veteran, service-disabled veteran, LGBT or disability-owned businesses, small businesses, or businesses owned by socially or economically disadvantaged persons; and Contractor commits to comply with any applicable Department contractual requirements pertaining to the employment of persons with disabilities pursuant to M.G.L. c. 7 s. 61(s). These provisions shall be enforced through the contracting Department, OSD, and/or the Massachusetts Commission Against Discrimination. Any breach shall be regarded as a material breach of the contract that may subject the contractor to appropriate sanctions.

9.1.18.6 Laws and Regulations Prohibiting Discrimination and Human Trafficking

Contractors acknowledge and certify as a condition of this Contract that they are responsible for complying fully with all state and federal laws prohibiting discrimination, human trafficking, and forced labor, including but not limited to Chapter 178 of the Acts of 2011.

9.1.19 Supplemental Provisions

9.1.19.1 Applicability

Where applicable, these Supplemental Provisions shall apply to this RFQ. In the event of a conflict or disparity between these Supplemental Provisions and Standard Terms & Conditions, the Supplemental Provisions govern.

9.1.19.2 Right-of-Way Safety Requirements

There are no Right-of-Way Safety Requirements for this procurement

9.1.19.3 Performance Guarantee

There is no Performance Guarantee required for this contract.

9.1.19.4 Liquidated Damages

There are no Liquidated Damages required for this contract.

9.1.19.5 Security Requirements

There are no Security Requirements for this contract.

9.1.19.6 Product Quotes

At any time that this Contract is in effect ("Term of Agreement"), MBTA shall have the right to request one or more price quote(s) for a Product (as defined below), including a quantity of fixed price Energy, for any term that falls within the Term of Agreement ("Product Quote") and Contractor shall provide such



Product Quote if and only to the extent a Product Quote is available in the market. Contractor shall be under no obligation to make a market for any Product requested pursuant to a Product Quote. MBTA and Contractor may agree upon a price based on the Product Quote for any period of time in the Term of Agreement and for any portion of MWhs directly related to MBTA's Load (a "Transaction").

9.1.19.7 Confirmations

(a) Transactions. A Transaction shall only result from an offer and acceptance that is clearly and mutually agreed to by MBTA and the Contractor. A Transaction that is verbally agreed to by MBTA and Contractor shall be confirmed in writing pursuant to Section 9.1.19.7(c). Each of MBTA and Contractor agree not to contest, or assert any defense to, the validity or enforceability of a Transaction entered into in accordance with this Contract (i) based on any law requiring agreements to be in writing or to be signed by the parties, or (ii) based on any lack of authority of the party or any lack of authority of any employee of the party to agree to a Transaction.

(b) Governing Terms. Each Transaction shall be governed by this Contract and the applicable Confirmation. All Transactions accepted in accordance with Section 9.1.19.7(c) are hereby incorporated by reference in this Contract, and the body of this Contract and all such Confirmations shall form a single integrated agreement between MBTA and the Contractor. Any inconsistency between any terms of this Contract and any terms of a Confirmation shall be resolved in favor of the terms of such Confirmation, subject to Section 9.1.19.7(d) below.

(c) Confirmation. Contractor shall confirm a Transaction by forwarding to MBTA by electronic mail within three (3) Business Days after the Transaction is electronically agreed to by MBTA and Contractor a confirmation of the Transaction (w) substantially in the form set forth in Appendix A for any Energy Transaction for a fixed volume of Energy (a "Transaction Confirmation"), (x) in a form mutually acceptable to MBTA and the Contractor for a Load Following Transaction (a "Load Following Transaction Confirmation"), (y) substantially in the form set forth in Appendix B for any REC Transaction or (z) in a form mutually acceptable to MBTA and the Contractor for any other Product. All forms of confirmations prepared hereunder shall be referred to herein collectively or interchangeably as the case requires as "Confirmations". If MBTA objects to any term(s) of such Confirmation, MBTA shall notify Contractor in writing of such objections within two (2) Business Days of MBTA's receipt thereof, failing which MBTA shall be deemed to have accepted the terms as sent, absent manifest error.

(d) Additional Confirmation Terms. If a Confirmation contains provisions, other than those provisions relating to the commercial terms of the Transaction, which modify or supplement the general terms and conditions of this Contract (e.g., arbitration provisions or additional representations and warranties), such provisions shall not be deemed to be accepted unless expressly agreed to by MBTA and Contractor as evidenced by a fully executed Confirmation; provided that the foregoing shall not invalidate any Transaction verbally agreed to by MBTA and Contractor or as otherwise set forth in the Confirmation.

9.1.19.8 Marginal Loss Revenue Load Obligation

As applicable, MBTA and Contractor shall allocate the Marginal Loss Revenue Load Obligation pursuant to Section III.3.2.1(b)(v) of Market Rule 1 (as may be amended, revised or renumbered from time to time) to Contractor for the applicable amount of Energy delivered. For purposes of this section, "Market Rule 1" shall have the definition given to such term in the Tariff.

9.1.19.9 Sales for Resale

All sales of Energy hereunder shall be sales for resale. MBTA shall have the right, in its sole discretion, to resell the Energy purchased from Contractor under this Contract.



9.1.19.10 Scheduling of Energy

Unless otherwise specified in the Confirmation pertaining to the purchase and sale of Energy, Contractor shall sell and schedule, and MBTA shall purchase and confirm, Energy at the Delivery Point during the Delivery Period pursuant to the quantities and prices set forth in any Confirmation. Unless otherwise provided in the applicable Confirmation pertaining to the purchase and sale of Energy, all Energy shall be scheduled by Contractor in the Day-Ahead Energy Market. Contractor shall provide MBTA with notice of its submittal of a such schedule at least two (2) Business Days prior to the beginning of the period covered by such schedule. Such notice may be made by email or other mutually agreeable form to MBTA or its scheduling contact as set forth in section 9.1.19.24 Notices and Contacts.

Unless MBTA and Contractor agree otherwise pertaining to the purchase and sale of Energy, Contractor shall schedule Energy by submitting one or more Internal Bilateral Transaction(s) for Energy (“IBT”) containers, as defined below (i.e., one Container for On-Peak Energy; one Container for Off-Peak Energy or as otherwise agreed), for (i) the shorter of successive six (6) month periods and the remaining Delivery Period or (ii) the longest period allowed by the Tariff, whichever is longer. For purposes of this Contract, “IBT Container” shall mean the form of electronic contract submittal, as implemented by the Tariff, that only requires BUYER to confirm the general parameters of the IBT and not the hourly schedules of Energy delivery.

9.1.19.11 Remedies for Failure to Schedule / Confirm

(a) Settlement of Energy Not Scheduled. Unless otherwise specified in a Confirmation, in the event Contractor fails to schedule Energy for delivery to the Delivery Point as required pursuant to this Contract or such schedule is rejected by ISO-NE where the IBT would render Contractor in default of its credit support obligations to ISO-NE and Energy is not scheduled for the Operating Day at issue, Contractor shall credit MBTA an amount equal to the sum of the products, if such amount is negative, of (i) the hourly amount of Energy not scheduled and (ii) the difference obtained by subtracting (a) the Day-Ahead Locational Marginal Price at the Delivery Point, as determined by ISO-NE in accordance with the Tariff, for the hours when Contractor failed to schedule from (b) the Energy Price for the hours in which Energy was not delivered at the Delivery Point hereunder. MBTA shall be entitled to offset amounts owed to it under this section against amounts owed to Contractor in its monthly invoice. For the avoidance of any doubt, MBTA and Contractor agree that MBTA shall only be entitled to offset amounts under this section if the Day-Ahead Locational Marginal Price at the Delivery Point for the relevant hours is greater than the applicable Energy Price.

(b) Settlement of Energy Not Confirmed. Unless otherwise specified in a Confirmation, in the event MBTA fails to confirm Energy for delivery to the Delivery Point as required pursuant to this Contract, Contractor shall charge MBTA, in addition to amounts owed by MBTA pursuant to this Contract for Energy that MBTA confirmed, an amount equal to the sum of the products, if such amount is positive, of (i) the hourly amount of Energy not confirmed and (ii) the difference obtained by subtracting (a) the Day-Ahead Locational Marginal Price at the Delivery Point, as determined by ISO-NE in accordance with the Tariff, for the hours when MBTA failed to confirm from (b) the Energy Price for the hours in which Energy was not delivered at the Delivery Point hereunder. For the avoidance of any doubt, the Parties agree that MBTA shall be obligated to pay any amounts under this section only if the Day-Ahead Locational Marginal Price at the Delivery Point for the relevant hours is less than the Energy Price.

(c) Exclusive Rights. Unless otherwise specified in a Confirmation, the remedies set forth in this section are the MBTA’s and Contractor’s exclusive remedies for the failure to schedule or confirm Energy.



9.1.19.12 Transmission

Contractor shall be responsible for all transmission arrangements and all costs associated therewith, necessary to deliver and transmit the Energy sold hereunder up to the Delivery Point. MBTA shall be responsible for all transmission arrangements, and all costs associated therewith, necessary to receive and transmit the Energy purchased hereunder at and from the Delivery Point to the consumption point meters registering MBTA's Load including, without limitation, all costs for any Regional Network Service ("RNS") and Local Network Service ("LNS") associated with the MBTA's Load.

9.1.19.13 Price Terms

(a) Calculation of Monthly Energy Charge. In addition to any other applicable charges as provided under this Contract and unless otherwise provided in a Confirmation for the applicable Transaction, MBTA shall pay to Contractor, for the applicable month, the sum of (a) the product of (i) the On-Peak Energy quantity measured in MW scheduled and confirmed for delivery to the Delivery Point and (ii) the applicable On-Peak Hours, and (iii) the On-Peak Energy price for the applicable month as set forth in a Confirmation, and (b) the product of (i) the Off-Peak Energy quantity measured in MW scheduled and confirmed for delivery to the Delivery Point, and (ii) the applicable Off-Peak Hours, and (iii) the Off-Peak Energy price for the applicable month as set forth in a Confirmation, summed for all Confirmations. The On-Peak Energy Prices and the Off-Peak Energy Prices set forth in the applicable Confirmation shall be referred to herein as the "Energy Price."

(b) Calculation of Other Amounts Owed. MBTA shall pay to Contractor amounts due for non-energy Products as set forth in the applicable Confirmation.

(c) No Liability for Additional Costs. MBTA and Contractor agree and acknowledge that the price and price methodology, as applicable, agreed to and documented in this Contract or a Confirmation, as applicable, shall remain effective for the entire Delivery Period set forth in the Confirmation and that such price and price methodology, as applicable, shall not be subject to any adjustment or change not expressly set forth in this Contract or in the Confirmation. After this Contract expires or terminates Contractor will not seek any stranded cost recovery or exit fee against MBTA, and hereby waives any present or future right to any such claims due to the existence or termination of this Contract. Nothing contained in this section is intended to limit the right of Contractor to seek redress in the event of MBTA's breach of this Contract or to limit the right of MBTA to seek redress in the event of Contractor's breach of this Contract. Contractor shall be responsible for all costs associated with the Energy up to the Delivery Point, and MBTA shall be responsible for all costs associated with the Energy at and after the Delivery Point.

9.1.19.14 Billing and Payment

(a) Challenge to Invoices. Unless otherwise agreed: (i) either MBTA or Contractor may challenge, in writing, the accuracy of any invoice, provided that no adjustment for any invoice or payment will be made unless the challenge to the accuracy thereof was made prior to the lapse of twelve (12) months from the receipt thereof; (ii) if MBTA or Contractor does not challenge the accuracy of an invoice within such twelve (12) month period, such invoice shall be binding upon that party and shall not be subject to challenge; and (iii) where it is determined as a result of an invoice challenge that an adjustment to an invoice or to an invoice adjustment is appropriate, such adjustment shall be included and accounted for in the invoice for the month following such determination.

(b) Disputed Invoice. Within the limitation of Section 9.1.19.14(a), each invoice shall be subject to adjustment for any errors in arithmetic, computation, estimating or meter inaccuracy. MBTA and Contractor shall use good faith efforts to resolve any billing and payment disputes promptly. If after such good faith negotiations, MBTA and Contractor are unable to resolve the dispute, MBTA or Contractor may pursue any and all other legal remedies in accordance with this Contract. Unless otherwise agreed, in case



of a dispute to any portion of any invoice, the amount not in dispute shall be paid in accordance with this Contract. Unless otherwise agreed, upon final determination of the invoice amount, any necessary adjustments in such invoice and the payments thereof shall be made in the invoice submitted in the month following such determination together with interest calculated at the Interest Rate. MBTA's payment of an invoice (whether or not under protest) shall not affect any legal or equitable rights a party may have to challenge the invoice within the time limitations established in Section 9.1.19.14a).

(c) Netting. If an Event of Default has not occurred and is not continuing, then if MBTA and Contractor are required to pay an amount in the same month each to the other under this Contract, such amounts shall be netted, and the party owing the greater aggregate amount shall pay to the other party any difference between the amounts owed. Notwithstanding the above, unless the party benefiting from credit support under Section 9.1.19.14 notifies the other party in writing, and except in connection with a liquidation and termination in accordance with Section 9.1.19.14, all amounts netted pursuant to this Section 9.1.19.14(c) shall not take into account or include any such credit support which may be in effect to secure a party's performance under this Contract.

(d) Setoff. Upon the designation of an Early Termination Date the Non-Defaulting Party ("X") may, at its option and in its discretion, setoff, against any amounts Owed to the Defaulting Party ("Y") by X under this Contract or under any other agreement, instrument and/or undertaking, any amounts Owed by Y to X (irrespective of the place of payment or booking office of the obligation) under this Contract or under any other agreement, instrument and/or undertaking (the "Net Settlement Amount"). The obligations of Y and X under this Contract in respect of such Net Settlement Amount shall be deemed satisfied and discharged to the extent of any such setoff exercised by X. X will give Y notice of any setoff effected under this section as soon as practicable after the setoff is effected provided that failure to give such notice shall not affect the validity of the setoff. For purposes of this section, "Owed" shall mean any amounts owed or otherwise accrued and payable (regardless of whether such amounts have been or could be invoiced) as of the Early Termination Date. If an obligation is unascertained, X may in good faith estimate that obligation and setoff on the basis of such estimate, subject to the relevant party accounting to the other when the obligation is ascertained. Nothing in this section shall be effective to create a charge or other security interest except as may be provided under applicable law. Each of MBTA and Contractor reserves all rights, setoffs, recoupments, counterclaims and other remedies and defenses (to the extent not expressly herein waived or denied) that such party has or to which such party may be entitled arising from or out of this Contract.

9.1.19.15 Transfer of Title

Title to the Energy delivered or received hereunder shall transfer from Contractor to MBTA at the Delivery Point. Title to other Products shall transfer from Contractor to MBTA as set forth in the applicable Confirmation.

9.1.19.16 Events of Default

For purposes of this Contract, each of the following shall constitute an event of default ("Event of Default") with respect to either of MBTA or Contractor that is subject to the Event of Default (the "Defaulting Party"):

(a) Failure by such party to make, when due, any payment required under this Contract if such failure is not remedied within three (3) Business Days after written notice of such failure is given by the other party ("Non-Defaulting Party") unless such party has disputed such payment in accordance with, and fully complies with the requirements of, this Contract.

(b) Such party or its guarantor, if applicable:



- (i) makes a general assignment for the benefit of creditors;
- (ii) files a petition or otherwise commences, authorizes or consents to the commencement of a proceeding, or cause of action, under any bankruptcy or similar law for the protection of creditors;
- (iii) has a petition filed or a proceeding commenced against it under any bankruptcy or similar law for the protection of creditors;
- (iv) is found by a court of competent jurisdiction to not be generally paying its debts as such debts become due;
- (v) admits in writing its inability to pay its debts generally as they become due;
- (vi) has a resolution passed for its winding-up or liquidation (other than pursuant to a consolidation, amalgamation or merger);
- (vii) seeks or becomes subject to the appointment of an administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official for it or for all or substantially all its assets; and/or
- (viii) has a secured party take possession of all or substantially all its assets or has a distress, execution, attachment, sequestration or other legal process levied, enforced or sued on or against all or substantially all its assets and such secured party maintains possession, or any such process is not dismissed, discharged, stayed or restrained, in each case within thirty (30) days thereafter.

(c) Failure by such party to perform any material covenant set forth in this Contract (other than the events that are otherwise specifically covered in this section as a separate Event of Default or its obligations to schedule or confirm Energy, the exclusive remedies for which are provided in Section 9.1.19.16 or in the applicable Confirmation), and such failure is not cured within three (3) Business Days after written notice thereof to such party.

(d) Any representation or warranty made in this Contract or in a Confirmation by such party is not true and complete in all material respects when given or when deemed given or repeated.

(e) Failure of such party to provide or maintain credit support as and when required by Section 9.1.19.16 or, if applicable, failure of the Contractor's guarantor to fulfill its obligations under its Guaranty and any such failure is not remedied within three (3) Business Days after written notice thereof to such party.

(f) Such party consolidates or amalgamates with, or merges with or into, or transfers all or substantially all of its assets to, another entity and, at the time of such consolidation, amalgamation, merger or transfer, the resulting, surviving or transferee entity either (i) is deemed by the other party to be less creditworthy than such party merging, amalgamating or transferring its assets was at the time of execution of this Contract or (ii) fails to assume all the obligations of such party under this Contract to which it or its predecessor was a party by operation of law or pursuant to an agreement reasonably satisfactory to the Non-Defaulting Party.



(g) The occurrence and continuation of (i) a default, event of default or other similar condition or event in respect of such party under one or more agreements or instruments, individually or collectively, relating to indebtedness for borrowed money in an aggregate amount of not less than (A) One Hundred Million Dollars (\$100,000,000) with respect to MBTA, (the “MBTA Cross Default Amount”), or (B) [] [Note to Bidder: Insert proposed amount and provide rationale for amount and indicate what % of shareholder equity the proposed figure represents based on most currently available financial statements.] with respect to Contractor’s guarantor (the “Contractor Cross Default Amount”), and which results in such indebtedness becoming immediately due and payable or (ii) a default by such Pprty in making on the due date therefor one or more payments, individually or collectively, in an aggregate amount of not less than the applicable MBTA Cross Default Amount (with respect to MBTA) or the Contractor Cross Default Amount (with respect to Contractor).

(h) The occurrence and continuation of a default, event of default or other similar condition or event in respect of such party under any agreement or instrument between MBTA and Contractor for the supply of power or any other forward contract, swap agreement or commodity contract, in each case as defined in the United States Bankruptcy Code and such event results in the early termination or liquidation of, or acceleration of obligations under, such agreement or instrument.

(i) with respect to such party’s guarantor, if any:

- (i) if any representation or warranty made by a guarantor in the Guaranty is false or misleading in any material respect when made or when deemed made or repeated;
- (ii) the failure of a guarantor to make any payment required or to perform any other material covenant or obligation in any Guaranty made in connection with this Contract and such failure shall not be remedied within three (3) Business Days after written notice;
- (iii) the failure of a guarantor’s Guaranty to be in full force and effect for purposes of this Contract (other than in accordance with its terms) prior to the satisfaction of all obligations of such party under each Transaction to which such Guaranty shall relate without the written consent of the other party; or
- (iv) a guarantor shall repudiate, disaffirm, disclaim, or reject, in whole or in part, or challenge the validity of its Guaranty.

9.1.19.17 Settlement Amount

If an Event of Default with respect to a Defaulting Party shall have occurred and be continuing, the Non-Defaulting Party shall have the right (i) to designate a day, no earlier than the day such notice is effective and no later than twenty (20) calendar days after such notice is effective, as an early termination date (“Early Termination Date”) to accelerate all amounts owing between MBTA and Contractor and to liquidate and terminate all, but not less than all, Transactions (each referred to as a “Terminated Transaction”) between MBTA and Contractor, (ii) withhold any payments due to the Defaulting Party under this Contract and (iii) suspend performance; provided, however, in no event shall any such suspension continue for longer than ten (10) Business Days with respect to any single Transaction unless an Early Termination Date shall have been declared and notice thereof pursuant to this section given. The Non-Defaulting Party shall calculate, in a commercially reasonable manner, a Settlement Amount for each such Terminated Transaction as of the Early Termination Date. If the Non-Defaulting Party establishes an Early Termination Date, the Non-Defaulting Party shall calculate, in accordance with this section, its Losses and Costs for each terminated Transaction reduced to present value as of the Early Termination Date and shall sum the Losses and Costs



pertaining to each terminated Transaction into a single settlement amount (“Settlement Amount”).

Notwithstanding the above language regarding the calculation of the Settlement Amount, the Non-Defaulting Party has the option of determining the Settlement Amount through the issuance of a competitive procurement solicitation for the remainder of the Delivery Period. If the Non-Defaulting Party elects to issue a competitive procurement solicitation to determine the Settlement Amount, then the Non-Defaulting Party shall request that each supplier that responds to the competitive procurement solicitation provide its final price on or before the date which coincides with the Early Termination Date, with such prices to be effective on the Early Termination Date. The average final prices of the qualified bid responses shall be used to determine the Settlement Amount for the remainder of the Delivery Period. The average final prices of the bid responses shall be present valued for each month using as the discount rate the yield on US Treasury Bills or Bonds, as the case may be, in effect on the day the calculation is made, as identified in *Bloomberg Online* or as published in *The Wall Street Journal*. If the Non-Defaulting Party elects to issue a request for proposals in order to determine the Settlement Amount, the Non-Defaulting Party shall be required to use the results of such request for proposals in making such determination. However, the Non-Defaulting Party shall be under no obligation to enter into a contract as a result of the request for proposals.

The Non-Defaulting Party shall determine a single liquidated amount (the “Termination Payment”) payable by the Defaulting Party to the Non-Defaulting Party by netting out from the Settlement Amount (a) (i) any Funds, Letter of Credit or other form of security then available to the Non-Defaulting Party pursuant to this Contract and (ii) at the option of the Non-Defaulting Party, any amounts due to the Defaulting Party under this Contract and any Transaction entered into pursuant to this Contract against (b) any amounts due to the Non-Defaulting Party under this Contract and any Transaction entered into pursuant to this Contract. The Termination Payment also shall include all amounts owed but not yet paid or invoiced by a party to the other party for performance already provided pursuant to this Contract, as reasonably calculated by the Non-Defaulting Party based on available estimates. Notwithstanding anything the contrary in this Contract, a Termination Payment shall never be due from the Non-Defaulting Party to the Defaulting Party.

As soon as practicable after a liquidation, notice shall be given by the Non-Defaulting Party to the Defaulting Party of the amount of the Termination Payment. The notice shall include a written statement explaining in reasonable detail the calculation of such amount. The Termination Payment shall be made by the Defaulting Party within three (3) Business Days after such notice is effective. In connection with such payment, the Non-Defaulting Party shall draw on any Funds, Letter of Credit or other form of security then available to the Non-Defaulting Party pursuant to this Contract, or otherwise account therefore in a manner consistent with the calculation of the Termination Payment.

If the Defaulting Party disputes the Non-Defaulting Party’s calculation of the Termination Payment, in whole or in part, the Defaulting Party shall nevertheless immediately pay the total Termination Payment within three (3) Business Days after receipt of the Non-Defaulting Party’s notice of such amount (plus any unpaid amounts owing to the Non-Defaulting Party), and, within seven (7) Business Days of receipt of such notice, provide to the Non-Defaulting Party a detailed written explanation of the basis for such dispute. The Non-Defaulting Party shall answer any questions, within two (2) Business Days of receiving such questions, from the Defaulting Party regarding the calculation of the Termination Payment. If the dispute is resolved in favor of the Defaulting Party, the disputed amount shall be refunded within seven (7) Business Days, with interest upon such amount, calculated at the Interest Rate from the date the Termination Payment was paid to the Non-Defaulting Party until the date upon which the refund is made.

For purposes of this Contract, the following terms shall have the following meanings:

“Costs” shall mean, with respect to the Non-Defaulting Party, brokerage fees, commissions and other similar third party transaction costs and expenses reasonably incurred by such Party either in terminating



any arrangement pursuant to which it has hedged its obligations or entering into new arrangements which replace the terminated transaction only related to this Contract; and all reasonable consulting and attorneys' fees and expenses incurred by the Non-Defaulting Party in connection with the termination of the transaction.

"Losses" shall mean, with respect to MBTA or Contractor, an amount equal to the present value of the economic loss to it, if any (exclusive of Costs), resulting from termination of the transaction only related to this Contract, determined in a commercially reasonable manner, in accord with market value in the ISO-NE Market. Each present value calculation shall be made using as a discount rate the yield on US Treasury Bills or Bonds, as the case may be, in effect on the day the calculation is made, as identified in Bloomberg Online or as published in The Wall Street Journal.

9.1.19.18 Limitation of Liability

ANY AND ALL IMPLIED WARRANTIES ARE DISCLAIMED. THE PARTIES CONFIRM THAT THE EXPRESS REMEDIES AND MEASURES OF DAMAGES PROVIDED IN THIS CONTRACT SATISFY THE ESSENTIAL PURPOSES HEREOF. FOR BREACH OF ANY PROVISION FOR WHICH AN EXPRESS REMEDY OR MEASURE OF DAMAGES IS PROVIDED, SUCH EXPRESS REMEDY OR MEASURE OF DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY, THE OBLIGOR'S LIABILITY SHALL BE LIMITED AS SET FORTH IN SUCH PROVISION AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED. IF NO REMEDY OR MEASURE OF DAMAGES IS EXPRESSLY PROVIDED HEREIN THE OBLIGOR'S LIABILITY SHALL BE LIMITED TO DIRECT ACTUAL DAMAGES ONLY, SUCH DIRECT ACTUAL DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED. NEITHER PARTY SHALL BE LIABLE FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY OR INDIRECT DAMAGES, LOST PROFITS OR OTHER BUSINESS INTERRUPTION DAMAGES, BY STATUTE, IN TORT OR CONTRACT OR OTHERWISE. IT IS THE INTENT OF THE PARTIES THAT THE LIMITATIONS HEREIN IMPOSED ON REMEDIES AND THE MEASURE OF DAMAGES BE WITHOUT REGARD TO THE CAUSE OR CAUSES RELATED THERETO, INCLUDING THE NEGLIGENCE OF ANY PARTY, WHETHER SUCH NEGLIGENCE BE SOLE, JOINT OR CONCURRENT, OR ACTIVE OR PASSIVE. TO THE EXTENT ANY DAMAGES REQUIRED TO BE PAID HEREUNDER ARE LIQUIDATED, THE PARTIES ACKNOWLEDGE THAT THE DAMAGES ARE DIFFICULT OR IMPOSSIBLE TO DETERMINE, OR OTHERWISE OBTAINING AN ADEQUATE REMEDY IS INCONVENIENT AND THE DAMAGES CALCULATED HEREUNDER CONSTITUTE A REASONABLE APPROXIMATION OF THE HARM OR LOSS.

9.1.19.19 Representations and Warranties

As a material inducement to entering into this Contract, each of MBTA and Contractor (unless otherwise specified), with respect to itself, represents and warrants to the other throughout the Term of Agreement (unless otherwise specified):

- (a) It is duly organized, validly existing and in good standing as applicable under the laws of the jurisdiction of its formation and is qualified to conduct its business in those jurisdictions necessary to perform this Contract.
- (b) It has all regulatory authorizations necessary for it to legally perform its obligations under this Contract and no consents of any other party and no act of any other governmental authority is required in connection with the execution, delivery and performance of this Contract.
- (c) The execution, delivery and performance of this Contract are within its powers, have been duly authorized by all necessary action and do not violate any of the terms or conditions in its governing



documents or any contract to which it is a party or any law, rule, regulation, order, writ, judgment, decree or other legal or regulatory determination applicable to it.

(d) This Contract constitutes a legal, valid and binding obligation of such party enforceable against it in accordance with its terms, subject to bankruptcy, insolvency, reorganization and other laws affecting creditor's rights generally, and with regard to equitable remedies, to the discretion of the court before which proceedings to obtain same may be pending.

(e) At the time of executing this Contract, there are no bankruptcy, insolvency, reorganization, receivership or other proceedings pending or being contemplated by it, or to its knowledge threatened against it.

(f) There are no suits, proceedings, judgments, rulings or orders by or before any court or any governmental authority that could materially adversely affect its ability to perform this Contract.

(g) It is party to a Market Participant Services Agreement with ISO-NE and otherwise has all rights with respect to the markets operated by ISO-NE required for it to fulfill its obligations under this Contract.

(h) It is a member of the New England Power Pool.

(i) It is acting for its own account, has made its own independent decision to enter into this Contract and as to whether this Contract is appropriate or proper for it based upon its own judgment, is not relying upon the advice or recommendations of the other party hereto in so doing, and is capable of assessing the merits of and understanding, and understands and accepts, the terms, conditions and risks of this Contract.

(j) With respect to each Transaction involving the purchase or sale of an option to purchase Energy, it is a producer, processor, commercial user or merchant handling the Energy or option, as applicable, and it is entering into such Transaction for purposes related to its business as such.

(k) Contractor warrants that at the time of executing this Contract it or its guarantor has an Investment Grade Credit Rating.

(l) MBTA warrants that at the time of executing this Contract it has an Investment Grade Credit Rating.

(m) It is a "forward contract merchant" within the meaning of the United States Bankruptcy Code.

(n) It shall comply with all applicable law relevant to this Contract.

9.1.19.20 Credit Support

(a) Contractor's Credit Support. If Contractor does not itself have an Investment Grade Credit Rating, then within five (5) Business Days after a Confirmation is executed by the parties hereunder, Contractor shall provide MBTA with a mutually-agreed guaranty issued by an entity with an Investment Grade Credit Rating substantially in the form attached hereto as Appendix C (the "Guaranty"). Such Guaranty shall guarantee the obligations of the Contractor to MBTA contained in this Contract and any outstanding Transaction as provided in such Guaranty. Such Guaranty shall become effective no later than five (5) Business Days after a Transaction is agreed upon by the Parties and shall continue in effect for at least the duration of the Transaction.

If Contractor has provided MBTA with a Guaranty pursuant to this Contract, then if Contractor's guarantor:

(i) elects to terminate or elects to assign its Guaranty or assigns said Guaranty to an entity that does not have an Investment Grade Credit Rating; (ii) fails to maintain an Investment Grade Credit Rating; and/or (iii) becomes subject to an event similar to the events described in Section 9.1.19.20(b) and/or an event



occurs with respect to SELLER's guarantor that is described in Section 9.1.19.20(i), then MBTA shall have reasonable grounds to believe that Contractor's creditworthiness or performance under this Contract has become unsatisfactory. With respect to romanette (i), Contractor shall replace the Guaranty with Margin calculated pursuant to Section 9.1.19.20(c) within three (3) days prior to the effective date of such termination or assignment of the Guaranty and, with respect to romanettes (ii) and (iii), Contractor shall replace the Guaranty with Margin calculated pursuant to Section 9.1.19.20(c) within three (3) Business Days or with a Guaranty from another entity with an Investment Grade Credit Rating in the same amount as the original Guaranty. Notwithstanding any provision in this Contract to the contrary, Contractor shall not be relieved of its obligation to MBTA to replace the Guaranty resulting from the termination or assignment of Contractor's original guarantor's Guaranty under any circumstances.

(b) MBTA's Credit Support. If MBTA fails to maintain an Investment Grade Credit Rating, then Contractor shall have reasonable grounds to believe that MBTA's creditworthiness or performance under this Contract has become unsatisfactory and MBTA shall provide Contractor with Margin in accordance with Section 9.1.19.20(c).

(c) Margin Payment.

- (i) If either party ("Party A") has reasonable grounds to believe that the other party's ("Party B") creditworthiness or performance under this Contract has become unsatisfactory, Party A may provide Party B with written notice demanding Margin in an amount equal to the Settlement Amount that would be calculated under Section 9.1.19.20 as if Party A were the Non-Defaulting Party ("Exposure"). Upon receipt of such notice, Party B shall have two (2) Business Days to provide such Margin to Party A. In the event that Party B fails to provide such Margin to Party A within two (2) Business Days of receipt of notice, then an Event of Default under Section 9.1.19.20(e) will be deemed to have occurred and Party A will be entitled to the remedies set forth in Section 9.1.19.20. For purposes of this Contract, Margin shall mean collateral in the form of U.S. Dollars delivered by wire transfer of immediately available funds ("Funds") or a Letter(s) of Credit. Costs of a Letter of Credit shall be borne by the applicant for such Letter of Credit. A Letter of Credit shall be valued at zero unless it expires more than thirty (30) days after the date of valuation; provided however, any successful draws, partial or otherwise, made prior to a letter of credit's applicable expiration date, shall be valued at its respective amount, if appropriate, as set forth elsewhere herein.
- (ii) Party A shall calculate the Exposure as of the close of every Business Day ("Margin Calculation Date"). If on any Margin Calculation Date, the Exposure, as determined by Party A in accordance with this section, exceeds the amount of Margin already held ("Margin Deficiency Amount"), then Party A shall send written notice to Party B demanding that Party B provide Party A with the Margin Deficiency Amount. Such written notice shall include all information that was used to calculate the Exposure. Upon receipt of such written notice, Party B shall provide the requested Margin within two (2) Business Days of receipt of the written notice. If, on any Margin Calculation Date, the Exposure is less than the amount of Margin held by Party A, then Party B shall send a written notice to Party A demanding that Party A return all or a portion of the Margin held by Party A within two (2) Business Days of receipt of written notice so that the amount of Margin held by Party A equals the Exposure. Such written notice shall include all information that Party A would reasonably need to confirm the requesting Party B's calculation of the Exposure.



All payments or returns of Margin shall be rounded up to the nearest integral multiple of \$10,000.00 (and rounded up if exactly between integral multiples of \$10,000.00). Neither party shall be required to provide or return Margin to the other party if the other party is the Defaulting Party or if an event occurs which, with the giving of notice or the lapse of time or both, would constitute an Event of Default with respect to that other party.

- (iii) Events that may give Party A “reasonable grounds to believe that Party B’s creditworthiness or performance under this Contract has become unsatisfactory” include, but are not limited to, the following:

(aa) Party A has knowledge that Party B (or its guarantor if Party B has issued a guaranty to Party A or the Qualified Institution that has issued a Letter of Credit on Party B’s behalf, if Party B has issued a Letter of Credit to Party A) is defaulting under other material contracts or transactions (including, but not limited to, contracts or transactions with third parties);

(bb) Any security previously posted by Party B is due to expire within thirty (30) calendar days;

(cc) A Downgrade Event has occurred with respect to Party B or its guarantor, if applicable;

(dd) With respect to Pledgor, an uncured Letter of Credit Default occurs; or

(ee) SELLER’s guarantor elects to terminate its Guaranty or elects to assign said Guaranty to an entity that does not have an Investment Grade Credit Rating or is subject to an event as specified in Section 9.1.19.20(b) and/or Section 9.1.19.20(i).

(d) To secure its obligations under this Contract and to the extent either or both MBTA or Contractor deliver Margin hereunder to the other party, each party delivering Margin hereunder (a “Pledgor”) hereby grants to the other party receiving such Margin (the “Secured Party”) a present and continuing security interest in, and lien on (and right of setoff against), and collateral assignment of, all cash collateral and cash equivalent collateral and any and all earnings and proceeds resulting therefrom or the liquidation thereof, whether now or hereafter held by, on behalf of, or for the benefit of, such Secured Party, and each Pledgor agrees to take such action as the Secured Party reasonably requires in order to perfect the Secured Party’s first-priority security interest in, and lien on (and right of setoff against), such collateral and any and all earnings and proceeds resulting therefrom or from the liquidation thereof. Upon or at any time after the occurrence or deemed occurrence of an Event of Default or an Early Termination Date, the Non-Defaulting Party may do any one or more of the following: (i) exercise any of the rights and remedies of a Secured Party with respect to all Funds or Letter of Credit held by or for its benefit, including any such rights and remedies under law then in effect; (ii) exercise its rights of setoff against any and all property of the Pledgor in the possession of the Secured Party or its agent; (iii) draw on any outstanding Letter of Credit issued for its benefit; and (iv) liquidate all Funds or Letter of Credit then held by or for the benefit of the Secured Party free from any claim or right of any nature whatsoever of the Defaulting Party, including any equity or right of purchase or redemption by the Defaulting Party. The Secured Party shall apply the proceeds of the collateral realized upon the exercise of any such rights or remedies to reduce the Pledgor’s obligations under this Contract (the Pledgor remaining liable for any amounts owing to the Secured Party after such application), subject to the Secured Party’s obligation to return any surplus proceeds remaining after such obligations are satisfied in full.



(e) Each of MBTA and Contractor will be entitled to hold Margin in the form of Funds provided that the following conditions applicable to it are satisfied: (1) it is not a Defaulting Party; (2) (a) with respect to Contractor, it or its guarantor, as the case may be, has and maintains an Investment Grade Credit Rating, and (b) with respect to MBTA, has and maintains an Investment Grade Credit Rating; and (3) the Funds are held only in the United States. Notwithstanding any other provision herein, for Funds held as Margin, the Interest Rate will be the Federal Funds Rate as from time to time in effect. "Federal Funds Rate" means, for the relevant determination date opposite the caption "Federal Funds (Effective)" as set forth in the weekly statistical release designated as H.15 (519), or any successor publication, published by the Board of Governors of the Federal Reserve System. Such interest shall be calculated commencing on the date Funds are received by a party but excluding the earlier of: (i) the date Funds are returned to a party; or (ii) the date Funds are applied to a Pledgor's obligations pursuant to Section 9.1.19.20 with the net amount of interest accrued monthly being payable on the third Business Day of the following month. A party holding Margin may apply such Margin, without prior notice to the other party, to satisfy the obligations of the other party in accordance with Section 9.1.19.20. Each party hereby covenants and agrees that it shall be entitled herein to hold Funds as custodian on its own behalf as a Secured Party if it meets the criteria set forth above in this section. However, if the party holding Funds is not eligible to hold Funds as Margin pursuant to this section, then such Funds shall be maintained as follows: the ineligible Secured Party will cause all Funds received from the other party as Margin to be segregated from the Secured Party's own property and identified clearly as Margin and to be held in an account in which no property of the Secured Party is held (a "Collateral Account") with a Qualified Institution, each of which accounts may include property of other parties which have delivered Funds to the Secured Party under other agreements, but will bear a title indicating that the Secured Party's interest in said account is as a holder of collateral. Such accounts will bear interest at the rate offered by the Qualified Institution. In addition, the Secured Party may direct the Pledgor to transfer or deliver eligible Margin directly into the Secured Party's Collateral Account. The Secured Party shall cause statements concerning the Margin transferred or delivered by the Pledgor to be sent to the Pledgor on request, which may not be made more frequently than once in each calendar month.

(f) If a party is required to deliver Margin and Margin is delivered in the form of a Letter of Credit, then, if a Letter of Credit Default occurs, the party which applied for such Letter of Credit shall have five (5) Business Days to cure the event(s) causing the Letter of Credit Default or to replace the Letter of Credit with a substitute Letter of Credit in the same amount as the Letter of Credit that is subject to the Letter of Credit Default ("Substitute Letter of Credit") or Funds in the same amount as the Letter of Credit that is subject to the Letter of Credit Default. Any failure to cure the event(s) causing the Letter of Credit Default or to provide a Substitute Letter of Credit or Funds within five (5) Business Days of the event(s) leading to the Letter of Credit Default shall be an Event of Default under Section 9.1.19.20(e). Pledgor's failure to deliver any Substitute Letter of Credit within the timeframe set forth in this section shall entitle the Secured Party to draw on the Letter of Credit and hold the cash proceeds of such Letter of Credit in its general account as security for Pledgor's obligations under this Contract. After drawing upon Pledgor's Letter of Credit in the manner described in the immediately preceding sentence and in the event that Pledgor cures the Letter of Credit Default, the Secured Party shall promptly return all such cash collateral; provided, that in no event shall the Secured Party be required to return such cash collateral if it is applied to amounts owing to the Secured Party under this Contract. Upon the Secured Party's receipt of: (a) a Substitute Letter of Credit in the same amount as the Letter of Credit that is subject to the Letter of Credit Default; or (b) Funds in the same amount as the Letter of Credit that is subject to the Letter of Credit Default, the Secured Party shall immediately cancel and return the initial Letter of Credit that was subject to the Letter of Credit Default to Pledgor and the Secured Party shall have no right whatsoever to draw upon such Letter of Credit.

9.1.19.21 Forward Contract



The parties acknowledge and agree that this Contract is a “forward contract”, that it is a “forward contract merchant” within the meaning of the United States Bankruptcy Code, and that it is acting as a “forward contract merchant” by entering into this Contract; it is an “eligible contract participant” as such term is defined in the Commodity Exchange Act, as amended (7 U.S.C. § 1(a)(12)); and it is an “eligible commercial entity” as such term is defined in the Commodity Exchange Act, as amended (7 U.S.C. § 1(a)(11)).

9.1.19.22 Credit Support as Margin Payment

The payment of margin or credit support by either party hereunder constitutes a “margin payment” under the United States Bankruptcy Code. The payment of the Settlement Amount constitutes a “margin payment” and the Termination Payment constitutes a “settlement payment” and/or a “transfer” under the Bankruptcy Code and for purposes of determining the Termination Payment by the Non-Defaulting Party, the netting out from the Settlement Amount of any credit support held by the Non-Defaulting Party under Section 9.1.19.16 herein shall constitute a “setoff or net out of termination values or payment amounts” under the Bankruptcy Code.

9.1.19.23 Commission Review

Neither party shall seek to change or amend this Contract in any way through making application to the Massachusetts Department of Public Utilities or Federal Energy Regulatory Commission (FERC) (or to any other government agency or authority), and this Contract shall not be subject to change through unilateral application by either party under Sections 205 and 206 of the Federal Power Act (or pursuant to any other provision of law). Each party hereby irrevocably waives the right to seek any change or to support any application or complaint or other legislative, judicial or regulatory action or proposal made seeking a change in the rates or a change in the terms and conditions of this Contract, absent the mutual agreement of the parties.

Absent the agreement of both parties to the proposed change, the standard of review for changes to this Contract proposed by either party, a non-party or the FERC acting *sua sponte*, shall be the “public interest” standard of review set forth in *United Gas Pipe Line Co. v. Mobile Gas Services Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) and clarified by *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish*, 554 U.S. 527, 128 S.Ct. 2733 (2008); provided, however, that if FERC or a court of competent jurisdiction holds that the parties cannot bind a non-party to the “public interest” application of the “just and reasonable standard”, then the standard of review for changes to this Contract proposed by a non-party shall be the most stringent standard permissible under applicable law (the “*Mobile-Sierra*” doctrine).

In addition, and notwithstanding the foregoing, to the fullest extent permitted by applicable law, each party, for itself and its successors and assigns, hereby expressly and irrevocably waives any rights it can or may have, now or in the future, whether under §§ 205 and/or 206 of the Federal Power Act or otherwise, to seek to obtain from FERC by any means, directly or indirectly (through complaint, investigation or otherwise), and each hereby covenants and agrees not at any time to seek to so obtain, an order from FERC changing any section of this Contract specifying the rate, charge, classification, or other term or condition agreed to by the parties, it being the express intent of the parties that, to the fullest extent permitted by applicable law, neither party shall unilaterally seek to obtain from FERC any relief changing the rate, charge, classification, or other term or condition of this Agreement, notwithstanding any subsequent changes in applicable law or market conditions that may occur.

9.1.19.24 Notices and Contacts

Notices. Any notice, demand, request, consent, approval, confirmation, communication, or statement which is required or permitted under this Contract, shall be in writing, except as otherwise provided, and shall be given or delivered by Federal Express or



comparable overnight delivery service, postage prepaid, addressed to the party at the address set forth below. Notwithstanding the foregoing, bills, invoices, credit memos, reports and other communications in the ordinary performance of the respective duties and obligations of the parties hereunder, may be sent by e-mail, first class mail or any other method, whether herein specifically provided or as the parties may hereafter adopt. Changes in such address shall be made by notice similarly given.

Notices to MBTA shall be sent to:

Sean Donaghy, Manager of Energy Programs, MBTA
sdonaghy@mbta.com
10 Park Plaza STE 6720
Boston MA 02116

With a copy to:

Energy New England LLC
5 Hampshire Street, Suite 100
Mansfield, MA 02048
Attn. Robert Kasle
Phone: (508) 698-1219
Email: rkasle@ene.org; settlement@ene.org

9.1.19.25 Definitions

“Business Day” means any day other than a Saturday, a Sunday, a holiday as defined by the North American Electric Reliability Council or any successor organization thereto and any Massachusetts holiday. A Business Day shall open at 8:00 a.m. and close at 5:00 p.m. local time for the relevant party’s principal place of business. The relevant party, in each instance unless otherwise specified, shall be the party from whom the notice, payment or delivery is being sent and by whom the notice or payment or delivery is to be received.

“Capacity Attributes” means any current or future capacity credits, tags, certificate, or similar accreditations established by a Governmental Authority based on the Installed Capacity of a generating unit, but not including any (a) energy, (b) Environmental Attributes, or (c) Tax Incentives, excluding any rebates on capital expenditures for reactive power-related equipment.

“Credit Rating” shall mean with respect to any Person, on any date of determination, the respective ratings then assigned to such entity’s unsecured, senior long-term debt or deposit obligations (not supported by third party credit enhancement) by S&P, Moody’s or other specified rating agency or agencies or if such entity does not have a rating for its unsecured, senior long-term debt or deposit obligations, then the rating assigned to such entity as its “corporate credit rating” by S&P.

“Delivery Period” shall mean the period of time commencing on the first day that Contractor obligated to sell a Product to MBTA and that MBTA is obligated to purchase such Product from Contractor and ending on the last day of such obligation as set forth in this Contract or any Confirmation.

“Delivery Point” shall have the meaning specified in a Confirmation.

“Energy” means electric energy measured in MWh or KWh.

“Environmental Attribute” means any and all presently existing or future benefits, emissions reductions, environmental air quality credits, emissions reduction credits, greenhouse gas emissions, RECs, including those granted sanctioned or issued by federal, state or local authorities, “green-e” certificates, offsets and allowances, green tag or other transferable indicia, howsoever entitled or named, resulting from the generation of renewable energy or the avoidance, reduction, displacement or offset of the emission of any



gas, chemical or other substance, including any of the same arising out of presently existing or future legislation or regulation concerned with oxides of nitrogen, sulfur or carbon, with particulate matter, soot or mercury, or implementing the United Nations Framework Convention on Climate Change, or laws or regulations involving or administered by the Clean Air Markets Division of the Environmental Protection Agency, or any successor state or federal agency given jurisdiction over a program involving transferability of Environmental Attributes, and any reporting rights to such Environmental Attributes. Environmental Attributes do not include (a) energy, (b) Tax Incentives, or (c) Capacity Attributes.

“Interest Rate” shall mean a per annum rate of interest equal to the prime lending rate as may from time to time be published in *The Wall Street Journal* under “Money Rates” on the Due Date for late payments under Article 6 (or if not published on such day on the most recent preceding day on which published).

“Investment Grade Credit Rating” shall mean a Credit Rating of at least BBB- from S&P or Baa3 from Moody’s; further provided, in the event of nonequivalent ratings, the lower rating shall be the determinant rating for this Article as well as any other Credit Rating based criterion set forth in this Contract.

“ISO-NE” shall mean ISO New England, Inc. or any successor thereto.

“ISO-NE Market System” shall mean the New England Transmission System and the New England Markets, as such terms are defined in Section I of the Tariff.

“Letter of Credit” means an irrevocable, transferable, standby letter of credit, issued by a Qualified Institution, substantially in the form set forth on Appendix D attached hereto, with such changes to the terms in that form as the issuing bank may require and as may be acceptable to the beneficiary thereof.

“Letter of Credit Default” means with respect to a Letter of Credit, the occurrence of any of the following events: (a) the issuer of such Letter of Credit shall fail to maintain a Credit Rating of at least (i) “A-” by S&P or “A3” by Moody’s, if such issuer is rated by both S&P and Moody’s, (ii) “A-” by S&P, if such issuer is rated only by S&P, or (iii) “A3” by Moody’s, if such issuer is rated only by Moody’s; (b) the issuer of the Letter of Credit shall fail to comply with or perform its obligations under such Letter of Credit; (c) the issuer of such Letter of Credit shall disaffirm, disclaim, repudiate or reject, in whole or in part, or challenge the validity of, such Letter of Credit; (d) such Letter of Credit shall expire or terminate, or shall fail or cease to be in full force and effect at any time during the Term of Agreement, in any such case without replacement; or (e) the issuer of such Letter of Credit shall become Bankrupt; provided, however, that no Letter of Credit Default shall occur or be continuing in any event with respect to a Letter of Credit after the time such Letter of Credit is required to be canceled or returned to a party in accordance with the terms of this Contract.

“Load” means the quantity of Energy, expressed in megawatts per hour, that is required to serve the retail Energy requirements of the end-use electricity customers in MBTA’s service territory, as represented by the Real Time Load Obligation of MBTA’s Load Asset.

“Load Asset” shall mean the asset designated in the ISO-NE Market System as Load Asset IDs, 180, 182, 210, 211, 975, 1319, 2421, 2473, 7635, 8200 or any successor identifier. A list of these Load Asset IDs, the Load Asset Name and the load zones can be found in Attachment D “List of Load Asset IDs”. Load Assets shall also be inclusive of any load assets under the MBTA ISO Customer ID: 50678.

“Load Following Transaction” means a Transaction that is entered into to serve all or a portion of MBTA’s Load on a load-following basis.

“Moody’s” shall mean Moody’s Investors Service.

“Person” shall mean any individual, partnership, firm, corporation, association, joint venture, trust or other entity, or any government or political subdivision or agency, department or instrumentality thereof.

“Product” means Energy, capacity, Environmental Attributes or other product(s) related thereto as specified in this Contract or a Confirmation.

“Qualified Institution” shall mean a U.S. commercial bank unaffiliated with either party, which has a capital and surplus of at least \$50 Billion and a Credit Rating of at least A- from S&P and A3 from Moody’s.

“Reference Market-maker” means a leading dealer in the relevant market selected by a party determining its Exposure in good faith from among dealers of the highest credit standing which satisfy all the criteria that such party applies generally at the time in deciding whether to offer or to make an extension of credit.

“S&P” shall mean Standard and Poor’s Rating Group.



“Tax Incentives” means (a) federal and state production tax credits, investment tax credits, or any other tax credits and (b) any cash payments or outright grants of money relating in any way to such tax credits.

“Tariff” shall mean the ISO New England, Inc. (“ISO-NE”) Transmission, Markets and Services Tariff, as it may hereafter be amended from time to time.

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9.1.20 Terms & Conditions Signature

IN WITNESS WHEREOF, the Contractor certifies under the pains and penalties of perjury that it shall comply with these MBTA Terms and Conditions under Section 9.0 – 9.1.20 for any applicable Contract executed with the MBTA as certified by their authorized signatory below:

Contractor Authorized Signatory: _____

Print Name: _____

(BLOCK LETTERS)

Title: _____

Date: _____

(check one) _____

Organization _____

Individual _____

Full legal Organization or Individual Name:			
Doing Business As Name (If Different):			
Tax Identification Number:			
Address:			
Phone:		Fax:	